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State of New York Public Employment Relations Board Decisions from November 9, 2010

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 9, 2010

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

- and -

CASE NO. C-5864

TOWN OF PAWLING,

Employer.

BARNES, IACCARINO, VIRGINIA, AMBINDER & SHEPHERD, PLLC (EMILY A. ROSCIA, Esq. of Counsel) for Petitioner

SHAW, PERELSON, MAY & LAMBERT, LLP (DAVID S. SHAW, ESQ. of Counsel) for Employer

BOARD DECISION AND ORDER

On January 22, 2009, Local 456, International Brotherhood of Teamsters (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Pawling (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Cleaner, Clerk to Town Justice, Groundskeeper, Head Greenskeeper, Head Groundskeeper, Laborer, Maintenance Worker, Recreation Leader, Secretary to the Planning Board and Zoning Board of Appeals, Senior Typist, Typist and Teen Center Director.

Excluded: Building Inspector 1/MS4 officer, Constable, Recreation Director, Bookkeeper to Supervisor, Summer Camp Counselor, Seasonal and/or Part-Time Recreation Assistant and all other employees.

Pursuant to that agreement, a secret-ballot election was held on August 12, 2010, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5995

COUNTY OF CHAUTAUQUA AND SHERIFF OF CHAUTAUQUA COUNTY,

Joint Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named joint public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Part-time Deputy Sheriffs employed by the Chautauqua County Sheriff's Office.

Excluded: All other employees of Chautauqua County.

FURTHER, IT IS ORDERED that the above named joint public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLERICAL & MAINTENANCE UNION OF THE BUFFALO AND ERIE COUNTY PUBLIC LIBRARY - CONTRACTING LIBRARIES, NYSUT/AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5991

ALDEN (EWELL) FREE LIBRARY, ET AL, CONTRACTING MEMBER LIBRARIES, WITHIN THE BUFFALO AND ERIE COUNTY PUBLIC LIBRARY SYSTEM,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Clerical & Maintenance Union of the Buffalo and Erie County Public Library-Contracting Libraries, NYSUT/AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public

employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time clerical and maintenance employees employed by Alden (Ewell) Free Library, et al, Contracting Member Libraries, individually, within the Buffalo & Erie County Public Library System.

Excluded: Managers, including Library Managers, confidential employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Clerical & Maintenance Union of the Buffalo and Erie County Public Library-Contracting Libraries, NYSUT/AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30,

Petitioner,

-and-

CASE NO. C-5947

HUDSON RIVER PARK TRUST,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the International Union of Operating Engineers, Local 30 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Chief Facilities Engineer, Assistant Director of Maintenance Operations, Mechanics, Maintenance Technician (Non-Trade), Maintenance Technician (Trade), Maintenance Technician (Horticultural), Motorpool Specialist, Operations Coordinator and Director of Marine Operations.

Excluded: All other employees, including seasonal and part-time employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 30. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSPORT WORKERS UNION, LOCAL 106, TRANSIT SUPERVISORS ORGANIZATION,

Charging Party,

- and -

CASE NO. U-24765

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

COLLERAN, O'HARA & MILLS L.L.P. (EDWARD J. GROARKE of counsel), for Charging Party

MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL (ROBERT K. DRINAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed both by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) and the New York City Transit Authority (NYCTA), to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by TSO, as amended, alleging that NYCTA violated §§209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act).[1] The charge alleges that NYCTA has engaged in a pattern and practice of reducing the number of Subway Supervisor Level II (SSII) positions in the TSO unit through attrition since 1997, imposed disproportionate discipline on unit employees and refused TSO's request to negotiate the impact of the reduction in the number of unit employees. As

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[1] 41 PERB ¶4599 (2008).

part of its amended charge, TSO alleges that NYCTA failed to fill four vacant SSII positions in September and November 2003, imposed disproportionate discipline on unit members in September and December 2003, and refused TSO's September 2003 demand to negotiate the impact of the reduction in the size of the unit.

At the request of the parties, there were lengthy delays in the processing of the charge based upon an expectation that related litigation would result in the resolution of the charge.[2] After presiding over four days of hearing, during which the parties were permitted to present multiple witnesses and documents about their extensive labor relations history, the ALJ issued a decision finding that NYCTA violated §209-a.1(d) of the Act by refusing to negotiate the impact of the reduction in the number of unit positions, and dismissing the remainder of TSO's charge.

EXCEPTIONS

In its exceptions, TSO challenges the ALJ's dismissal of its claim that NYCTA violated §§209-a.1(a) and (c) of the Act on the grounds that NYCTA's cumulative conduct, including actions taken in September, November and December 2003, demonstrate a pattern and practice of improper motivation under the Act toward TSO and its unit employees. As part of its exceptions, TSO seeks reversal of Board precedent rejecting the application of a continuing violation theory under the Act. It also seeks a finding that NYCTA engaged in a continuing violation by failing to fill SSII vacancies, and by increasing the frequency and magnitude of disciplinary action against

[2] *Supra*, note 1, 41 PERB ¶4599 at 4824, n.1.

unit members including TSO activists. In addition, TSO contends that the failure to fill SSII positions constitutes a *per se* violation of §§209-a.1(a) and (c) of the Act. NYCTA supports the ALJ's dismissal of TSO claims pursuant to §§209-a.1(a) and (c) of the Act.

NYCTA excepts to the ALJ's conclusion that it failed to negotiate the impact of the reduction in the number of employees in the TSO unit in violation of §209-a.1(d) of the Act. According to NYCTA, the evidence establishes that it engaged in impact negotiations with TSO, and that it has never refused to bargain impact. TSO supports the ALJ's finding that NYCTA violated §209-a.1(d) of the Act.

Based upon our review of the record, and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The facts are fully set forth in the ALJ's decision. We briefly review the evidence with respect to the 13 years of diverse facts and procedural history relied upon by TSO in support of its exceptions, as well as the evidence relating to the ALJ's conclusion that NYCTA violated its duty to engage in impact negotiations in response to a TSO demand.

In 1984, the SSII position was created by NYCTA as part of its reorganization of supervisory responsibilities. For seven years after the creation of the position, NYCTA steadily increased the number of employees holding SSII positions. In 1992, NYCTA opposed TSO's representation petition seeking to represent a new unit of SSII employees. NYCTA's opposition was premised upon two grounds: waiver based upon a prior NYCTA-TSO side agreement, and a claim that some of the employees were

managerial or confidential. After the managerial/confidential issue was resolved through an agreement to exclude certain SSII employees from the proposed unit, NYCTA unsuccessfully pursued its waiver argument before the Director of Public Employment Practices and Representation (Director), the Board, and in court.[3] On February 24, 1995, TSO was certified to represent a unit of SSII employees in the NYCTA's Division of Stations, with certain SSII positions excluded consistent with the parties' stipulation.[4]

The final resolution of NYCTA's arguments in opposition to the representation petition led to a delay in the commencement of negotiations between the parties. Ultimately, the parties reached a one-year agreement in September 1999 that was followed by a successor three-year agreement, which expired on September 30, 2003. The parties did not reach another agreement until 2008.

Between 1995 and the filing of TSO's charge in the present case, NYCTA discontinued filling SSII positions when they became vacant, resulting in a steady decline in the number of TSO unit employees as well as a decrease in the number of SSII positions that are excluded from the unit. According to TSO witnesses, the undisputed drop in SSII staffing, along with NYCTA's enlargement of the areas supervised by SSII employees, increased the workload for the remaining SSII

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[3] *NYCTA*, 27 PERB ¶4038 (1994), *affd*, 27 PERB ¶3060 (1994), *confirmed sub nom. NYCTA v New York State Pub Empl Rel Bd*, 232 AD2d 492, 29 PERB ¶7018 (2d Dept 1996).

[4] *NYCTA*, 28 PERB ¶3000.05 (1995).

employees, and decreased the number of available preferred assignments for TSO unit employees.

In 1998, the parties resolved a TSO improper practice charge alleging that NYCTA violated the Act when it reassigned two recently elected TSO officers from their SSII desk positions. Under the terms of the settlement, the TSO officers were returned to their SSII desk positions with the caveat that they would not conduct TSO activities during work time. In addition, the agreement preserved NYCTA's contention that the SSII desk positions were confidential under the Act.

Commencing in 1999, there was an increase in the frequency of disciplinary allegations made against TSO unit employees resulting from a change in NYCTA's disciplinary procedure. In 2000, a TSO officer was served with multiple separate disciplinary charges alleging assorted forms of misconduct. Many of those charges were withdrawn, and others were settled with a warning or retraining.

In 2002, the Board dismissed a TSO charge alleging that NYCTA violated §209-a.1(d) of the Act in 2001 by unilaterally reassigning SSII supervisory duties to Station Supervisor Level I (SSI) employees, who are not in the TSO unit. The charge was dismissed based upon a finding that TSO lacked exclusivity over those supervisory duties.[5] A subsequent TSO charge in 2004, which alleged the unilateral transfer of

[5] *NYCTA*, 35 PERB ¶3028 (2002) *confirmed sub nom. Romaine v Cuevas*, 305 AD2d 968, 36 PERB ¶7010 (3d Dept 2003).

other supervisory duties, was similarly dismissed.[6] In addition, TSO unsuccessfully pursued contract grievances over changes in the work hours and preference assignments of SSII employees.

In September and November 2003, NYCTA did not fill four additional SSII positions that had become vacant. In September and December 2003, NYCTA imposed discipline on a total of 13 TSO unit members.

In September and October 2003, TSO made written requests for impact negotiations with respect to NYCTA's decisions to not fill vacant SSII positions and to expand the areas supervised by SSII employees. The requests were made following prior conversations between the parties about the subjects. In response to TSO's requests for impact negotiations, NYCTA met with TSO, but it did not agree to commence impact negotiations. Instead, it told TSO to pursue a related grievance to arbitration.[7] In June 2006, the issues raised in TSO's 2003 requests for impact negotiations were discussed between the parties as part of contract negotiations for a new agreement.

DISCUSSION

Our discussion begins with TSO's contention that NYCTA's cumulative conduct,

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[6] *NYCTA*, 38 PERB ¶3024 (2005). Despite our 2002 and 2005 rulings, the ALJ permitted TSO to introduce evidence regarding NYCTA's reassignment of SSII duties to SSI employees, which TSO relies upon to support its exceptions. *See*, Memorandum of Law in Support of Charging Party's Exceptions, pp. 3, 6-7.

[7] The parties, however, did meet in January 2004 to discuss TSO's concerns with respect to 2004 SSII preference assignments including the change in hours. Transcript, pp. 370-74, 559-61.

including NYCTA's actions in September, November and December 2003, demonstrate a pattern and practice of improperly motivated acts toward TSO and its unit employees in violation of §§209-a.1(a) and (c) of the Act.

In support of its argument, TSO does not cite any precedent recognizing a pattern and practice claim under the Act, nor does it articulate a proposed standard for determining such a claim. Although our case law permits a charging party to introduce evidence of a contentious labor relations history, including prior employer anti-union acts or statements, to prove a timely alleged violation of §§209-a.1(a) and (c) of the Act,[8] we have not previously addressed a pattern and practice claim by an employee organization.[9]

We need not address TSO's purported pattern and practice claim because it consists of nothing more than an amalgam of mostly unrelated factual and legal disputes between the parties over a 13-year period, without sufficient evidence demonstrating improper motivation or *per se* violations of §§209-a.1(a) and (c) of the

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[8] *See*, *Town of Henrietta*, 28 PERB ¶3079 (1995); *Erie County Water Auth*, 27 PERB ¶3010 (1995); *Port Jervis City Sch Dist (McAndrew)*, 33 PERB ¶3027 (2000). The potential admissibility of such evidence does not remove an ALJ's discretion to exclude such evidence when he or she determines that it is not probative or relevant to the alleged improperly motivated employer action that is the subject of the charge. Among the effective means for avoiding an unnecessarily voluminous record is to require parties to submit offers of proof or to permit motions *in limine*.

[9] We note, however, that the New York Charter School Act of 1998, Educ Law §2850 *et seq*. expressly grants our agency jurisdiction to determine a pattern and practice claim against a charter school under §§209-a.1(a) and (c) of the Act. *See*, Educ Law §2855.1(d).

Act.[10]

Contrary to TSO's contention, NYCTA's objections to TSO's 1992 representation petition do not establish improper animus or constitute a *per se* violation of §§209-a.1(a) and (c) of the Act. NYCTA had a right to contest the representation petition, including challenging the appropriateness of the proposed unit. Similarly, the mere failure of the parties to expeditiously reach a negotiated first agreement, and subsequent agreements, does not evince interference or discrimination by NYCTA under the Act.

The evidence of adverse actions NYCTA took against unit officers and other SSII employees does not support TSO's alleged pattern and practice claim. The terms of the 1998 settlement of TSO's improper practice charge regarding the reassignment of the two TSO unit officers constitutes the law of the case and, therefore, the motivational issue regarding those transfers cannot be resurrected as part of an alleged pattern and practice claim.[11] Furthermore, the record fully supports the ALJ's finding that TSO failed to demonstrate that the increase in the number and severity of the disciplinary charges against the TSO unit officer and SSII unit employees between 1999 and 2003 were improperly motivated. TSO failed to meet its burden, through direct or circumstantial evidence, to demonstrate that the disciplinary actions taken since 1999

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[10] *See, UFT, Local 2, AFT, AFL-CIO (Jenkins)*, 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd*, 41 PERB ¶7007 (Sup Ct New York County 2008) *affd*, 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009).

[11] In addition, we affirm the ALJ's conclusion that TSO failed to demonstrate during the hearing that the transfers were improperly motivated.

were unlawfully motivated in violation of §§209-a.1(a) and (c) of the Act.

We also reject TSO's contention that NYCTA's practice of not filling vacant SSII positions since 1995, and the alleged adverse impact the practice has had on the remaining unit members, demonstrates a pattern and practice of violations of §§209-a.1(a) and (c) of the Act. It is well-settled that, in the absence of proof of improper motivation under the Act, an employer's decision to abolish or not fill a position does not violate the Act.[12] In the present case, TSO fails to demonstrate that NYCTA was motivated by improper animus in failing to fill vacant SSII positions. In fact, during the lengthy period cited by TSO, NYCTA did not fill any SSII position whether within or excluded from the TSO unit.

Our decision in *New York City Transit Authority*[13] is inapplicable to the facts and circumstances of the present case. In *New York City Transit Authority,* we found a *per se* violation of §§209-a.1(a) and (c) of the Act based upon evidence that an employer abolished 75 percent of the bargaining unit's positions after the successful negotiation of a first contract, and replaced those abolished positions with new managerial positions. Unlike that case, the evidence in the present case does not demonstrate that NYCTA's decision not to fill vacant SSII positions inherently undermines and interferes

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[12] *See*, *County of Schenectady and the Schenectady County Sheriff*, 18 PERB ¶3038 (1985); *State of New York (Office of Mental Retardation & Developmental Disabilities)*, 24 PERB ¶3036 (1991).

[13] 21 PERB ¶3007 (1988), *confirmed sub nom. New York City Transit Auth v New York State Pub Empl Rel Bd*, 154 AD2d 680, 22 PERB ¶7036 (2d Dept 1989), *order modified*, 154 AD2d 680, 22 PERB ¶7037 (2d Dept 1989).

with TSO's ability to represent its unit members. Moreover, NYCTA established legitimate business reasons for decreasing the number of SSII positions.

Next, we consider TSO's request that we reexamine our case law rejecting the application of a continuing violation theory with respect to the timeframe for the filing of an improper practice charge under §204.1(a) of our Rules of Procedure (Rules).[14] It is well-settled that we strictly construe the timeframe under our Rules for the filing of a charge.[15] Based upon our conclusions today that TSO failed to prove that NYCTA's conduct over the 13-year period violated §§209-a.1(a) and (c) of the Act, it is unnecessary for us to reconsider our timeliness doctrine.

Finally, we consider NYCTA's exceptions to the ALJ's decision finding that it violated §209-a.1(d) of the Act when it failed to commence impact negotiations as requested by TSO. The evidence establishes that in response to TSO's September and October 2003 requests for impact negotiations regarding the reduction in unit employees, NYCTA did not agree to begin impact negotiations. Instead, it directed TSO to pursue a contract remedy. Negotiations on the impact of NYCTA's failure to fill vacant SSII positions did not commence until June 2006, during contract negotiations for a successor agreement.

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[14] *See*, *City of Yonkers,* 7 PERB ¶3007 (1974); *Village of Malone,* 8 PERB ¶3045 (1975); *UUP (Iden),* 13 PERB ¶3086 (1980); *Triborough Bridge and Tunnel Auth,* 17 PERB ¶3017 (1984); *NYCTA*, 26 PERB ¶3081 (1993); *State of New York (Dept of Ins)(Shayne),* 36 PERB ¶3026 (2003); *CUNY*, 40 PERB ¶3004 (2007).

[15] See, *City of Elmira*, 25 PERB ¶3072 (1992); *City of Albany*, 23 PERB ¶3027 (1990) *confirmed sub nom. City of Albany v Newman*, 181 AD2d 953, 25 PERB ¶7002 (3d Dept 1992).

Based upon the foregoing, we affirm the ALJ's decision dismissing TSO's allegations under §§209-a.1(a) and (c) of the Act, and her finding that NYCTA violated §209-a.1(d) of the Act, but modify the remedial order consistent with our recent precedent.[16]

IT IS THEREFORE ORDERED that NYCTA:

1. forthwith negotiate in good faith with TSO regarding the impact of the reduction in the number of SSIIs in the TSO unit; and

2. sign and post a notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[16] *See*, *Town of Wallkill*, 43 PERB ¶3026 (2010); *County of Monroe*, 43 PERB ¶3025 2010).

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the New York City Transit Authority in the unit represented by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) that the New York City Transit Authority will forthwith negotiate in good faith with the TSO regarding the impact of the reduction in the number of SSIIs.

Dated . . . . . By . . . . . .
(Title) (Representative)

NEW YORK CITY TRANSIT AUTHORITY

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30,

Petitioner,

CASE NO. C-5947

- and -

HUDSON RIVER PARK TRUST,

Employer.

ARCHER, BYINGTON, GLENNON & LEVINE, LLP (PAULA CLARITY of counsel), for Petitioner

BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL, RAYMOND J. PASCUCCI and LAUREN J. DARIENZO of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the Hudson River Park Trust (Trust) to a decision of the Director of Public Employment Practices and Representation (Director) denying its election objections, filed pursuant to §201.9(h)(2) of the Rules of Procedure (Rules), to a secret mail-ballot election with respect to a representation petition filed by International Union of Operating Engineers, Local 30 (Local 30) seeking to represent a unit of 16 Trust employees.

EXCEPTIONS

In its exceptions, the Trust contends that the Director erred by denying its objection concerning the failure of the PERB agent to count three mail-ballots. In addition, the Trust asserts that the Director erred in denying its objection to the PERB

agent's noncompliance with the procedure set forth in *County of Washington,*[1] with respect to a fourth timely ballot that was received in an unsigned envelope. Finally, the Trust excepts to the Director's decision not to set aside the election, and the Director's conclusion that Local 30 is entitled to be certified as the negotiating agent for the unit as the result of the election. Local 30 supports the Director's decision.

Based on our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director.

FACTS

On March 2, 2010, the PERB agent conducted a conference with the parties, during which a consent agreement was executed, and the parties agreed to a schedule for the holding of a mail-ballot election with the ballot count to take place on April 19, 2010. The parties signed a consent agreement for the conduct of the election that included a handwritten paragraph stating that, for the purpose of the agreement, Local 30 waives the right to a certification without an election under our Rules and the parties agree to the holding of an election.

The day after the conference, the PERB agent sent a confirming letter with the agreed-upon schedule, along with a copy of the notice of election to be posted in the Trust's workplace. Under the schedule, the notice would be posted in the workplace by the Trust by March 11, 2010, the ballots would be mailed by PERB to the eligible employees on March 23, 2010, and replacement ballots could be requested by eligible voters on March 31, 2010. The letter expressly stated that "[a]ll ballots must be received at PERB's Latham, New York post office box by 9:30 a.m. on April 15, 2010. Ballots

[1] 42 PERB ¶3021 (2009).

received after that date shall be void."

Consistent with the schedule, the Trust posted the notice of election on its workplace kitchen bulletin board on March 11, 2010. The notice directed employees to: "Mail your signed envelope to the Public Employment Relations Board in time for it to arrive at our Latham post office box by **9:30 a.m. on April 15, 2010.**" The notice included a clear and unambiguous direction for the voter to sign the return envelope: **"SIGN YOUR FULL NAME ON THE SIGNATURE LINE ON THE BACK OF THE ENVELOPE!"** The notice also stated that noncompliance with the instructions can result in the invalidation of a ballot.

On March 23, 2010, PERB mailed the ballots to eligible Trust employees along with written directions and pre-paid return envelopes. Each voter was directed to mail the ballot to PERB "as soon as possible" in a signed return envelope. In addition, the directions stated that:

> For your vote to be counted, you must have been an employee on **FEBRUARY 24, 2010** and still be so employed on **APRIL 19, 2010**. In addition, the envelope containing your ballot must arrive in our Latham post office box by 9:30 a.m. on **April 15, 2010**.

Finally, the directions stated that: **"Your failure to comply with the above directions may invalidate your ballot!"**

Thirteen ballots were received at PERB's post office box by the stipulated deadline of April 15, 2010 at 9:30 a.m. Those ballots were forwarded to the PERB agent for the scheduled April 19, 2010 ballot count. At the beginning of the count, one ballot was voided by the PERB agent on the ground that the return envelope was unsigned. The parties were not granted an opportunity to consent to the ballot being counted. The remaining 12 ballots were tallied by the PERB agent. Seven votes were in favor of Local

30 representation, and five against.

Following the vote count, PERB learned that two additional ballots from eligible employees were received at its post office box after the stipulated deadline, including one ballot that was received in an unsigned return envelope. The ballot in the unsigned return envelope, which was received on April 15, 2010 after the 9:30 a.m. deadline, was postmarked April 13, 2010. The other ballot, which was received on April 17, 2010, was postmarked April 14, 2010.

During the course of the Director's investigation into the Trust's objections, pursuant to §201.9(h)(4) of the Rules, an affidavit was submitted by the employee whose ballot was received on April 15, 2010, stating that the ballot was mailed on or before April 9, 2010. The second employee, whose ballot was received on April 17, 2010, submitted an affidavit stating that he mailed his ballot on or before April 8, 2010. Furthermore, a third employee submitted an affidavit stating that he mailed his ballot on April 10, 2010. However, PERB did not receive this third ballot.

DISCUSSION

Throughout our history, PERB has utilized mail-ballot elections, as well as on-site elections, in representation cases. Our longstanding procedure for conducting a mail-ballot election includes the establishment of a schedule by the PERB agent at a conference with the parties. The schedule includes agreed-upon dates for the following: employee eligibility, the employer's posting of the notice of election at the workplace, the employer's mailing to PERB a set of mailing labels containing the names and addresses of the unit employees employed on the eligibility date, PERB's mailing ballots to eligible

unit employees, employees' calling PERB for a replacement ballot, receipt of ballots and the ballot count.

Voting instructions included in the notice of election set forth the date and specific time when ballots must be received at PERB's post office box, the obligation of a voter to sign the return envelope, along with a warning that the failure to comply with the instructions can invalidate a ballot. Similarly, the directions attached to the mail ballots sent to the eligible employees include the same information, and state that envelopes containing the ballots should be mailed to PERB "as soon as possible." Like the notice of the election, the instructions make clear that a failure to comply with the directions can result in the invalidation of a ballot. Under our long-standing practice, and consistent with the instructions and directions to the eligible voters, mail ballots received after the scheduled deadline are treated as void, and are not counted.

In its exceptions, the Trust does not challenge the appropriateness of holding a mail-ballot election in the present case, the clarity of our written instructions to eligible voters, or the period of time under the schedule for the return of ballots to our post office box. Instead, it contends that the results of the election should be set aside because the ballots of three eligible voters, who aver that they mailed their ballots between five and seven days prior to the stipulated deadline, were not counted. It is undisputed that two of these ballots were received at our post office box after the expiration of the deadline, and one was never received.

Among the inherent aspects of a mail-ballot election is the potential for eligible voters to fail to follow our instructions along with the potential for delayed delivery or the loss of ballots by the United States Postal Service. Nevertheless, our mail-ballot

procedures and voting instructions help to minimize both potentialities through clear written instructions in the notice of election posted in the workplace well in advance of the scheduled count,[2] and the equally clear written directions for the ballots to be mailed back as soon as possible.

In support of its exceptions, the Trust relies upon *Plainedge Union Free School District*,[3] where the Director set aside an election based upon a wholesale postal failure, as a result of which PERB received ballots from none of the seven eligible employees who comprised the unit. In that case, affidavits were submitted from each of the seven eligible voters stating that he or she had mailed a ballot back to PERB, thereby demonstrating that the non-receipt of the ballots was caused by a postal malfunction.

In the present case, however, the Trust has not demonstrated a postal error or malfunction that may warrant the relief it seeks. We received ballots from over 80% of the 16 eligible voters prior to the deadline expiration, and the return envelopes for the two late ballots were post-marked within a day or two of the expiration date. In light of our clear instructions and directions concerning the importance of the ballots being received by April 15, 2010 at 9:30 a.m., together with the reasonable potential for postal delays, we are not persuaded by the Trust's argument that the election should be set aside.

In addition, the Trust argues in its brief that the Board should modify its practices

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[2] The importance we place in the timely posting of the notice of election is highlighted by our decision in *South Huntington Union Free Sch Dist,* 25 PERB ¶3069 (1992) to set aside an election due to a delay in the posting of the notice of election caused by PERB agents.

[3] 18 PERB ¶4029 (1985).

by adopting the policy of the National Labor Relations Board (NLRB) of counting all ballots received prior to a vote count.[4] In *County of Oneida,*[5] we rejected an argument by an employee organization urging us to adopt an NLRB practice of automatically sending a replacement ballot to a unit employee who failed to sign the return envelope if the unsigned envelope was received before the due date for the return of the ballots. While private sector case law and procedures constitute persuasive authority, there are multiple differences in the NLRB's mail-balloting procedures, including the fact that ballots are returned to the NLRB Regional Director rather than a post office box. Such procedural differences are reflective of the distinct administrative experiences and the resources allocated for each agency. Finally, we are reluctant to adopt a *post-hoc* modification of one aspect of our mail-ballot procedure for the sole purpose of being consistent with the procedures of the NLRB or any other labor relations agency. The voiding of ballots received at our post office box after the stipulated deadline "is so longstanding that it would be inappropriate to alter it retroactively here."[6] Any changes to our mail-ballot procedures should be considered only as part of a possible comprehensive agency reexamination of our election procedures.

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[4] Section 11336.5(c) of the NLRB's R-Casehandling Manual (II) states:

> **Late or Unsigned Envelopes**
>
> Ballots contained in envelopes received before the count should be counted, even if they are received after the close of business on the return date. *Kerrville Bus Co.* 257 NLRB 176 (1981). Ballots that are returned in envelopes with no signatures or with names printed rather than signed should be voided. *Thompson Roofing, Inc*, 291 NLRB 742 (1988).

[5] 29 PERB ¶3001 (1996).

[6] *County of Washington*, *supra*, note 1, 42 PERB ¶3021 at 3076.

In *County of Washington,*[7] we reaffirmed our policy of PERB agents challenging ballots received in unsigned envelopes. Such ballots will be counted, however, if the parties enter into a written agreement to waive the signature requirement. Regrettably, the PERB agent in the present case denied the parties the opportunity to agree that unsigned ballots will be counted despite our decision in *County of Washington.* Nevertheless, we affirm the Director's conclusion that the PERB agent's failure did not have an impact on the results of the election.

Based upon the foregoing, we deny the exceptions by the Trust, affirm the decision of the Director, and dismiss the Trust's objections.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

[7] *Supra*, note 1.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

CASE NO. U-30052

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Respondent.

RONALD GRASSEL, *pro se*

BOARD DECISION AND ORDER

This matter comes to the Board on a motion by Ronald Grassel (Grassel) for leave to file exceptions pursuant to §212.4(h) of the Rules of Procedure (Rules), to an interim determination by the Director of Public Employment Practices and Representation (Director),[1] pursuant to §204.2(a) of the Rules, declining to process the allegations contained in a charge that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by seeking to terminate Grassel pursuant to

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[1] Although Grassel has labeled his pleading as exceptions, we are treating it as a motion for leave to file exceptions because it seeks interlocutory review of an interim determination by the Director.

Educ Law §3020-a, by refusing to comply with a court decision, by ostracizing him, and by failing to respond to his letter dated February 8, 2010.

PROCEDURAL BACKGROUND

In the past two years, the Board dismissed two prior charges filed by Grassel that alleged that the District violated §§209-a.1(a) and (c) of the Act when it sought to discipline him pursuant to Educ Law §3020-a.[2] In our most recent decision, we concluded that Grassel had failed to allege sufficient facts that, if proven, would create an inference that the December 17, 2007 disciplinary charges against him by the District violated §§209-a.1(a) and (c) of the Act. In the present charge, Grassel again alleges that the District violated §§209-a.1(a) and (c) of the Act by pursuing the December 17, 2007 disciplinary charges. In addition, he alleges that the District was improperly motivated by refusing to comply with a court decision, by ostracizing him, and by failing to respond to his letter.

Following an initial review of Grassel's latest charge, the Director determined that the allegations made against the District should not be processed. In contrast, the Director processed Grassel's allegation that the United Federation of Teachers, Local 1, AFT, AFL-CIO violated §§209-a.2(a) and (c) of the Act by failing to respond to one of his letters.

[2] *Board of Education of the City School District of the City of New York (Grassel)*, 41 PERB ¶3024 (2008); *Board of Education of the City School District of the City of New York (Grassel)*, 43 PERB ¶3010 (2010).

DISCUSSION

Leave to file interlocutory exceptions to non-final rulings and decisions, pursuant to §212.4(h) of the Rules, will be granted only when a moving party demonstrates extraordinary circumstances.[3] This high standard is predicated on "our recognition that it is more efficient to await a final disposition of the merits of a charge before we examine interim determinations. The improvident grant of leave can result in unnecessary delays in the processing of improper practice charges."[4]

Pursuant to §204.2(a) of the Rules, the Director performs an important administrative function for the agency by reviewing all newly filed charges to weed out facially deficient charges.[5]

In the present case, following our review of Grassel's motion for leave to file exceptions, after granting all reasonable inferences to be drawn from the facts alleged in his charge against the District, we conclude that Grassel has failed to establish the existence of extraordinary circumstances warranting the grant of leave to file exceptions for purposes of reviewing the Director's interim

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[3] *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007); *UFT (Grassel)*, 32 PERB ¶3071 (1999).

[4] *Board of Educ of the City School District of the City of New York (Grassel)*, 41 PERB ¶3031 at 3135 (2008).

[5] *MABSTOA*, 40 PERB ¶3023 (2007).

determination pursuant to §204.2(a) of the Rules.[6]

Based upon the foregoing, the motion by Grassel for leave to file exceptions is denied.

SO ORDERED.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

[6] Alternatively, if we were to grant Grassel's motion, we would dismiss his allegations against the District based upon the doctrine of *res judicata* with respect to the District's motivation in pursuing the December 17, 2007 charges, and based upon his failure to allege any facts that even remotely support his claim that the District was improperly motivated under the Act.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

CASE NO. U-30189

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Respondent.

RONALD GRASSEL, *pro se*

BOARD DECISION AND ORDER

This matter comes to the Board on a motion by Ronald Grassel (Grassel) for leave to file exceptions pursuant to §212.4(h) of the Rules of Procedure (Rules) to an interim determination by the Director of Public Employment Practices and Representation (Director),[1] pursuant to §204.2(a) of the Rules, declining to process allegations contained in a charge alleging that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a), (c), (f) and (g) of the Public Employees' Fair Employment Act (Act) by seeking to terminate Grassel pursuant to Educ Law §3020-a and by refusing to comply with a court decision.

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[1] Although Grassel has labeled his pleading as exceptions, we are treating it as a motion for leave to file exceptions because it seeks interlocutory review of an interim determination by the Director.

PROCEDURAL BACKGROUND

This is at least the fourth charge filed by Grassel alleging that the District is improperly motivated in seeking to discipline him pursuant to Educ Law §3020-a in violation of §§209-a.1(a) and (c) of the Act. In two prior decisions, we affirmed the dismissal of those claims on the merits.[2] In our last decision on the merits, we found that Grassel's allegations, if true, were insufficient to establish an inference that the December 17, 2007 disciplinary charges issued against him were improperly motivated. In the present case, Grassel again alleges that the District violated §§209-a.1(a) and (c) of the Act by pursuing the same disciplinary charges. In addition, he alleges that the District was improperly motivated by refusing to comply with a court decision with respect to those charges.

Following an initial review of Grassel's charge, the Director determined that the allegations made against the District should not be processed. However, the Director processed Grassel's allegation that the United Federation of Teachers, Local 1, AFT, AFL-CIO (UFT) violated §§209-a.2(a) and (c) of the Act by its alleged failure to respond to a letter.

DISCUSSION

We will grant a motion for leave to file interlocutory exceptions to non-final rulings and decisions pursuant to §212.4(h) of the Rules, only when a moving party demonstrates extraordinary circumstances.[3] An "improvident grant of leave

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[2] *Board of Education of the City School District of the City of New York (Grassel)*, 41 PERB ¶3024 (2008); *Board of Education of the City School District of the City of New York (Grassel)*, 43 PERB ¶3010 (2010).

[3] *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007); *UFT (Grassel)*, 32 PERB ¶3071 (1999).

can result in unnecessary delays in the processing of improper practice charges."[4]

Pursuant to §204.2(a) of the Rules, the Director is responsible for reviewing all newly filed charges to weed out facially deficient claims.[5] This invaluable administrative function helps to ensure an efficient utilization of our agency's resources. In addition, the Director's determination not to process meritless claims prevents respondents from having to file pleadings and defend against such claims.

Following our review of Grassel's motion for leave to file exceptions, and after granting all reasonable inferences to be drawn from the facts alleged in his charge against the District, we conclude that Grassel has failed to establish the existence of extraordinary circumstances warranting the grant of leave to file exceptions for purposes of reviewing the Director's interim determination pursuant to §204.2(a) of the Rules.[6]

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[4] *Board of Educ of the City School District of the City of New York (Grassel),* 41 PERB ¶3031, at 3135 (2008).

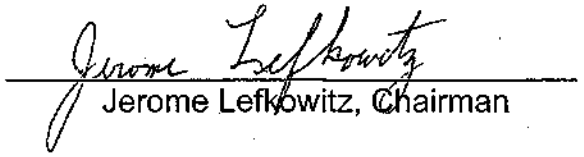
[5] *See, MABSTOA*, 40 PERB ¶3023 (2007).

[6] Alternatively, if we were to grant Grassel's motion, we would dismiss his allegations against the District based upon the doctrine of *res judicata* with respect to the District's motivation in pursuing the December 17, 2007 charges, and based upon his failure to allege any new facts that even remotely support his claim that the District was improperly motivated under the Act.

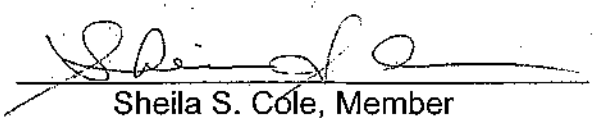
Based upon the foregoing, the motion by Grassel for leave to file exceptions is denied.[7]

SO ORDERED.

DATED: November 9, 2010
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

[7] Pursuant to §212(j) of the Rules, an individual may be suspended or disbarred from practicing before the Board when it is demonstrated after a hearing that he or she has engaged in aggravated misconduct. While we are sensitive to the fact that Grassel is unrepresented, and that neither the District nor UFT has made a motion seeking such sanctions under our Rules, the continued filings of redundant charges and vexatious motions by Grassel may constitute sufficient misconduct to form the basis for the imposition of appropriate sanctions in the future. *See*, *In Re Halley*, 30 PERB ¶3023 (1997).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

- and -

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent.

CASE NO. U-28910

SHEEHAN, GREENE, CARRAWAY, GOLDERMAN & JACQUES, LLP (WILLIAM P. GOLDERMAN of counsel), for Charging Party

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the State of New York (Department of Correctional Services) (State) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director), on an improper practice charge filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA), finding that the State violated §§209-a.1(a) and (g) of the Public Employees' Fair Employment Act (Act) when it denied a request by a NYSCOPBA unit probationary correction officer for representation during questioning by

a Department of Correctional Services (DOCS) Office of Inspector General (OIG) investigator on January 16, 2009 regarding the use of force by correction officers on an inmate at the Great Meadow Correctional Facility on December 26, 2008, and subsequently terminated the probationary correction officer on January 29, 2009.[1]

EXCEPTIONS

As part of its exceptions, the State asserts that the Assistant Director erred in concluding that it violated §§209-a.1(a) and (g) of the Act on the following grounds: 1) at the time of questioning, it did not reasonably appear that the probationary correction officer was a potential subject or target of disciplinary action because there were no pending allegations of wrongdoing against him; 2) it is irrelevant that NYSCOPBA representation was permitted during the questioning of permanent correction officers by DOCS OIG during the same investigation; 3) the Assistant Director improperly placed the burden of proof on the State to demonstrate that the probationary correction officer was not the potential subject or target of disciplinary action at the time of questioning; and 4) the denial of representation during employer questioning of a public employee does not constitute a violation of §209-a.1(a) of the Act. Finally, the State takes exception to the Assistant Director's proposed remedial order, including that portion of the order which directs the reinstatement of the probationary correction officer with back

[1]42 PERB ¶4545 (2010).

wages and benefits.[2]

NYSCOPBA supports the Assistant Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the Assistant Director's decision and order in part, but reverse her finding that the State violated §209-a.1(a) of the Act, and modify the proposed remedial order.

FACTS

The State and NYSCOPBA are parties to an agreement containing a negotiated disciplinary procedure in lieu of Civ Serv Law §§75 and 76, and a Bill of Rights granting unit members the right to NYSCOPBA representation during an interrogation if it is contemplated that the employee may be served with a notice of discipline under the disciplinary procedure. Neither party claims that the agreement provides probationary employees in the NYSCOPBA unit with a contract-based entitlement to representation during DOCS questioning.

[2] The State's exceptions also repeat a number of legal arguments that we recently rejected in *State of New York (Department of Correctional Services)*, 43 PERB ¶3031 (2010): a) probationary employees are not covered by §209-a.1(g) of the Act; b) the purpose of §209-a.1(g) of the Act is to grant representational rights only to those employees who are subject to Civ Serv Law §75 disciplinary procedures or who are subject to disciplinary procedures under a collectively negotiated agreement; and c) an interpretation of §209-a.1(g) of the Act that recognizes representational rights of probationary employees is an impairment of the State's contractual rights in violation of Article 1, §10 of the United States Constitution. In light of our prior decision, we need not reiterate our reasoning for rejecting those legal arguments.

On January 28, 2008, Wayne Sheridan (Sheridan) was hired as a DOCS correction officer. While working at the Great Meadow Correctional Facility on December 26, 2008, and while still in probationary status, Sheridan responded to a call about a confrontation taking place at the facility involving the use of force by correction officers to subdue an inmate. Upon arriving at the scene, Sheridan observed fellow officers on the floor struggling with the inmate. Sheridan assisted in restraining the inmate, who was face down and kicking, by holding down his ankles for approximately 15 seconds until the inmate was placed in handcuffs by another officer. It is undisputed that five officers, including Sheridan, were involved in this use of force incident.[3]

Immediately following the incident, Sheridan and the other officers were directed to prepare memoranda about what had occurred.[4] In addition, an investigation was commenced by DOCS OIG regarding the incident because, as a DOCS OIG investigator testified, "it was obvious that this was a major incident and something major had occurred that was not reported."[5] As part of the investigation, DOCS OIG obtained photographs and medical records, which led DOCS to conclude that the inmate had sustained injuries, including baton strikes to his left arm, thigh and his left knee during the incident.[6] It also obtained photographs of certain officers who worked at the facility.

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[3] Transcript, pp. 100-101

[4] Joint Exhibit 4, pp. 19, 27-29; Joint Exhibit 5.

[5] Transcript, p. 89.

[6] Transcript, p. 89; Joint Exhibit 4, pp. 17, 21-23

A total of 18 correction officers, including Sheridan and four other officers directly involved in the incident, were questioned by DOCS OIG at its offices on the W. A. Harriman State Office Campus (State Office Campus). With the exception of Sheridan, all of the correction officers were permitted NYSCOPBA representation during questioning.[7]

Pursuant to a DOCS memorandum dated January 15, 2009, Sheridan's probationary period was extended until February 9, 2009.[8] It is undisputed that the extension was directly related to the investigation into the use of force incident.[9]

In response to an order, Sheridan appeared for questioning by a DOCS OIG investigator on January 16, 2009 at DOCS' offices on the State Office Campus. Prior to the questioning, a NYSCOPBA attorney informed the DOCS Deputy Inspector General that Sheridan wanted representation, and that both Sheridan and the attorney believed that Sheridan was a target of the investigation and a potential subject of discipline. The Deputy Inspector General denied the representation request stating that, as a matter of DOCS policy, a probationary employee is not entitled to representation during questioning. In addition, he told the NYSCOBPA attorney that DOCS had not made a determination as to whether "Sheridan was a target of the investigation."[10] Thereafter,

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[7] Transcript, pp. 94-96, 98.

[8] Charging Party Exhibit 3.

[9] Transcript, pp. 129-130.

[10] Joint Exhibit 2. In contrast, a NYSCOPBA shop steward testified that he was told that Sheridan "wasn't a target." Transcript, p. 45.

the questioning of Sheridan commenced before a stenographer, without the presence of a NYSCOPBA representative.

After Sheridan was placed under oath and given a copy of DOCS Directive No. 0102, entitled Rights of Departmental Employees, which sets forth the rights of DOCS employees during an investigation, Sheridan requested NYSCOPBA representation, which was denied.[11] The DOCS OIG investigator told Sheridan that the questioning was part of an official investigation into the use of force incident, and that he was obligated to answer each question. In addition, he was told that "[a]t this time" he was not the target of the investigation or a target of discipline but that if he admitted to misconduct or wrongdoing during the questioning or was not "completely honest", he may be terminated.[12]

During the questioning, Sheridan was asked to describe his physical contact with the inmate during the incident. In response to specific questions, Sheridan denied that he had assaulted, kicked, punched or struck the inmate with a baton or was responsible for injuries that appeared in photographs shown to him.[13] At various points during the

[11] The stenographic transcript of the questioning, and the DOCS Directive are in the record. Joint Exhibit 4; Respondent Exhibit 2. Even after the enactment of §209-a.1(g) of the Act in 2007, the DOCS Directive references only non-criminal investigatory procedures under Civ Serv Law §75 or a negotiated agreement. Respondent Exhibit 2, II.B.

[12] Joint Exhibit 4, pp. 2-3. During his testimony before the Assistant Director, the DOCS OIG investigator testified that other than Sheridan's statements in his memorandum, "[t]here was no other allegations against Mr. Sheridan or anything at that point." Transcript, p. 88.

[13] Joint Exhibit, pp. 21, 25-26.

questioning, Sheridan stated that he was unable to identify the officers or the inmate involved because they were not facing him during his short presence at the incident. In addition, he denied observing the inmate being injured or the presence of blood on the floor.

On January 20, 2009, DOCS OIG sent a memorandum to DOCS' Director of Human Resources Daniel Martuscello, III (Martuscello) stating that Sheridan was not forthcoming during questioning because he denied observing the use of force by other correction officers during the incident.[14] Two days later, Sheridan was terminated from his probationary position because of a "lack of specificity" in his answers to the questions about what occurred during the incident.[15] In addition, Martuscello testified that the termination was based upon a concern that Sheridan's answers demonstrated an inability to be a credible witness regarding inmate misconduct in a correctional environment.[16] Subsequent to Sheridan's termination, DOCS justified its adverse action based upon its conclusion that he was not forthcoming and truthful during the questioning.[17]

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[14] Respondent Exhibit 7.

[15] Transcript, pp. 120, 132. Similarly, the DOCS OIG investigator testified that he was concerned about Sheridan's lack of specificity about what took place during the incident. Transcript , pp. 89-90.

[16] Transcript, pp. 120-121.

[17] Transcript, pp. 67, 72; Respondent Exhibit 4.

DISCUSSION

In *State of New York (Department of Correctional Services),*[18] we set forth the applicable standards under §209-a.1(g) of the Act for determining whether, at the time of questioning, it reasonably appeared that an employee was the potential subject or target of disciplinary action:

> In determining this question, we consider the totality of the circumstances including the reasonableness of the employee's subjective perception, which may have precipitated the request for representation. Although an employee's perceptions are relevant to our inquiry, our primary focus is on objective facts in the record. Those facts include: the subject matter and context of the questioning; the verbal and written statements by the employer prior to the questioning; the verbal exchange between the employer representative and the employee; the timing and venue of the questioning; and the treatment of other employees similarly situated.[19]

Based upon the totality of the circumstances in the present case, we conclude that the State violated §209-a.1(g) of the Act by denying Sheridan's request for NYSCOPBA representation during the questioning on January 16, 2009. The evidence establishes that NYSCOPBA and Sheridan reasonably believed that he was a potential subject or target of discipline, and therefore, they requested DOCS to permit him to be represented by a NYSCOPBA representative during the questioning.

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[18] *Supra,* note 2.

[19] 43 PERB ¶3031, at 3121.

Additional objective evidence in the record further demonstrates that it reasonably appeared at the time of questioning that Sheridan was a potential subject or target of discipline. The written recommendation seeking Sheridan's termination, dated January 21, 2009, states that at the time of questioning he was "under official investigation."[20] Furthermore, the questioning took place in the context of a DOCS investigation into a major incident at a correctional facility involving the use of force by correction officers, which DOCS believed resulted in substantial physical injuries to an inmate, and was not reported by the correction officers involved. It is undisputed that Sheridan was one of the five correction officers who utilized force during the incident, and he filed a report that did not mention the use of force by the other correction officers or the inmate's injuries.

During the questioning by the DOCS OIG investigator, Sheridan was told that he was not the target of the investigation or a target of discipline "at this time," but that his answers may result in his termination. This verbal exchange between the DOCS OIG investigator and Sheridan demonstrates that he was a potential subject or target of discipline. The facts that Sheridan may not have been a current target of the investigation, and there were no pending allegations of wrongdoing against him, do not negate the potential that he may become a subject or target of discipline based upon the substance of his responses to questions concerning his conduct during and after the incident. Indeed, Sheridan was specifically questioned about his own use of force on

[20] Respondent Exhibit 5.

the inmate, and whether his conduct caused the injuries displayed in the photographs. Furthermore, Sheridan was questioned about the use of force by other officers, which was not reported in his memorandum following the incident.

The context and manner of the questioning provide further support for our conclusion that Sheridan was a potential subject or target of discipline. Sheridan was questioned under oath, before a stenographer, and at DOCS OIG's offices on the State Office Campus where interrogations are generally conducted. During the questioning, Sheridan was given a copy of a DOCS Directive outlining the rights of employees during departmental investigations including the right of representation during an interrogation.

We reject the State's exception to the Assistant Director's reliance on the fact that other unit members were permitted NYSCOPBA representation during the investigation. In *State of New York (Department of Correctional Services),*[21] we concluded that the fact that other unit employees were permitted representation during investigatory questioning is relevant to whether another employee questioned over the same incident was a potential subject or target of discipline. In the present case, DOCS permitted 17 other correction officers to be represented by NYSCOPBA during questioning, all of whom had a contractual right to such representation when DOCS contemplated serving a notice of discipline under the parties' agreement.

We find nothing in the record or the Assistant Director's decision to support the State's argument that the Assistant Director improperly placed the burden of proof on

[21] *Supra*, note 2.

the State to demonstrate that Sheridan was not the subject or target of potential disciplinary action at the time of questioning. NYSCOPBA had the burden of proving by a preponderance of evidence the elements necessary to demonstrate a violation of §209-a.1(g) of the Act. The fact that the Assistant Director was not persuaded by the State's evidence does not constitute a misapplication of the burden of proof.

We next turn to the State's exception challenging the Assistant Director's conclusion that it violated §209-a.1(a) of the Act. In *State of New York (Department of Correctional Services),*[22] we held that the denial of representation during investigatory questioning by an employer does not constitute a violation of §209-a.1(a) of the Act.[23] As a result, we reverse the Assistant Director's finding that the State violated §209-a.1(a) of the Act when it denied such representation to Sheridan.

Finally, we consider the State's exception challenging the Assistant Director's proposed remedial order. Specifically, it objects to that portion of the proposed remedial order directing the reinstatement of Sheridan with back wages and benefits based upon the denial of NYSCOPBA representation during the January 16, 2009 questioning.[24]

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[22] *Supra*, note 2.

[23] Our conclusion was based upon the Legislature's decision to not amend §202 of the Act following the decision in *NYCTA v New York State Pub Empl Rel Bd,* 8 NY3d 226, 40 PERB ¶7001 (2007).

[24] In its brief, the State contends that NYSCOPBA failed to adequately plead that Sheridan's termination resulted from the denial of representation during the questioning. This argument, however, is without merit because the charge can reasonably be interpreted to allege a causal connection between Sheridan's termination and the denial of representation. ALJ Exhibit 1, Details of Charge, ¶¶6-13, 19.

The purpose of our remedial orders "is to make parties whole for the wrong sustained by placing them as nearly as possible in the position they would have been in had the improper practice not been committed." [25] In enacting §209-a.1(g) of the Act, the Legislature did not modify PERB's authority, pursuant to §205.5(d) of the Act, to order "an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article (but not to assess exemplary damages), including but not limited to the reinstatement of employees with or without back pay."

The Legislature's decision to grant PERB the authority to apply its full improper practice remedial powers to violations of §209-a.1(g) of the Act constitutes a public policy determination that our agency should have greater powers to remedy the denial of representation during employer questioning than that granted to the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA).[26] In contrast to our remedial authority under §205.5(d) of the Act, the powers of the NLRB are expressly restrained in cases when an employee was terminated for cause pursuant to

[25] *Burnt Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶3066, at 3139 (1992). *See also, City of Oneonta,* 43 PERB ¶3006 (2010). It has been long settled that the "remedies for improper employer practices are peculiarly matters within [PERB's] administrative competence." *City of Albany v Helsby*, 29 NY2d 433, 439, 5 PERB ¶7000, at 7003 (1972).

[26] 29 USC §§151-169.

§10(c) of the NLRA.[27]

Prior to the enactment of §209-a.1(g) of the Act, the Board regularly ordered make-whole relief, including reinstatement with back wages and benefits, when an employer's improper practice resulted in the termination of an employee, including a probationary employee, because such remedies are consistent with the policies of the Act.[28] Contrary to the State's argument, our remedial orders requiring reinstatement and other make-whole relief for employees harmed by an improper practice are not limited to cases involving improper employer motivation under the Act.[29]

Although we have declined to order reinstatement with back wages in the two cases cited by the State, both cases are limited to their particular facts involving criminal behavior by employees, and are inapplicable to the present case. In *City of Olean*,[30] we declined to remedy an employer's improperly motivated adverse action with an order of

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[27] 29 USC §160(c) states, in part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." *See,Taracorp Inc,* 273 NLRB 221(1984) overruling *Kraft Foods*, 251 NLRB 598 (1980).

[28] *Sag Harbor Union Free Sch Dist*, 8 PERB ¶3077 (1975), *confirmed Sag Harbor Union Free Sch Dist*, 54 AD2d 391, 9 PERB ¶7023 (3d Dept 1976); *City of Buffalo (Police Department)*, 20 PERB ¶3048 (1987); *Mahopac Cent Sch Dist*, 28 PERB ¶3045 (1995); *County of Wyoming*, 34 PERB ¶3042 (2001).

[29] *See, Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed sub nom. and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶3016 (2009); *Burnt Hills-Ballston Lake Cent Sch Dist, supra* note 21; *Mahopac Cent Sch Dist*, *supra*, note 28.

[30] 2 PERB ¶3069 (1969).

reinstatement because the evidence established the employee had failed to disclose his record of felony convictions on his employment application, and the employer had a policy of not hiring or retaining employees with a felony conviction.[31] Similarly, in *Croton-Harmon Union Free School District,*[32] we applied our discretion by not ordering reinstatement where a Civ Serv Law §75 hearing officer had previously found that the employees had engaged in intentional theft of overtime compensation, and the evidence in the PERB record established that employer's discovery of the theft was independent of the unlawfully motivated investigation.[33]

In contrast to those cases, the present case does not involve proven criminal activity, but rather a termination resulting from dissatisfaction by the State with the answers given by an employee during questioning conducted in violation of §209-a.1(g) of the Act. Among the reasons for requiring employee organizational representation during employer questioning is that a representative can aid in the search for the truth

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[31] We note that our decision in *City of Olean* was consistent with the general civil service principle, set forth in Civ Serv Law §50.4, permitting the revocation of an appointment upon a finding of an illegality, irregularity or fraud of a substantial nature in a civil service application.

[32] 31 PERB ¶3086 (1998), *pet dismissed* 32 PERB ¶7010 (Sup Ct Albany County 1999).

[33] Since *Croton-Harmon Union Free Sch Dist, supra* note 31, the Legislature amended §205.5(d) of the Act to preclude the grant of deference to findings of fact and law made by a Civ Serv Law §75 hearing officer. L 2001, c 389.

and, at the same time, protect the employee's rights.[34] As the United States Supreme Court stated in *NLRB v J Weingarten, Inc*:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.[35]

Under the facts and circumstances of the present case, we conclude that a remedial order directing the reinstatement of Sheridan to his probationary position with back wages and benefits is consistent with the policies of the Act. The evidence demonstrates a direct relationship between the denial of representation and Sheridan's termination, which was based upon the State's perception that his answers were incomplete or untruthful. NYSCOPBA representation during the DOCS OIG questioning may have diminished the basis for this perception by the representative rephrasing, clarifying or supplementing the questions asked, and by providing Sheridan with advice during the course of the questioning. In reaching our conclusion today, we note that DOCS did not offer any objective evidence demonstrating that Sheridan's answers under oath constituted perjury.

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[34] See, Governor Spitzer's Approval Memorandum No. 10, L 2007, c 244, Bill Jacket, p. 3.

[35] 420 US 251, 262-263 (1975).

In order to return Sheridan to the *status quo ante*, we modify the Assistant Director's proposed remedial order to make clear that upon his reinstatement, Sheridan will be returned to his probationary status at the time of the termination.[36]

Nothing in this decision shall prohibit the State, following Sheridan's reinstatement, from conducting another interrogation regarding the December 26, 2008 use of force incident so long as, upon request, he is permitted to have NYSCOPBA representation during such questioning, and the State does not utilize any information, documents or the transcript resulting from the January 16, 2009 interrogation.

Based upon the foregoing, we affirm the Assistant Director's decision finding that the State violated §209-a.1(g) of the Act, reverse the finding that it violated §209-a.1(a) of the Act, and modify the recommended remedial order.

IT IS THEREFORE ORDERED that the State:

1. forthwith offer Sheridan reinstatement to his former probationary correction officer position, and make him whole for any wages and benefits lost from his termination to the effective date of the offer of reinstatement, with interest at the maximum legal rate;

2. immediately remove and destroy all documents maintained by the State regarding the January 16, 2009 questioning of Sheridan, including the transcript of the January 16, 2009 interrogation, the January 20, 2009 memorandum to Martuscello, the written recommendation seeking Sheridan's termination dated January 21, 2009, and

[36] *See*, *Pastore v City of Troy*, 152 AD2d 808 (3d Dept 1989).

any other documents in DOCS personnel records, correction officer Sheridan's personnel history folder, and in DOCS OIG's investigatory notes, memoranda, email, and reports, relating to the questioning of Sheridan without representation;

3. reconsider Sheridan's probationary status without reference to the content of the January 16, 2009 questioning;

4. not use any information received from Sheridan during the January 16, 2009 questioning, and

5. sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Correctional Services) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. that the State of New York (Department of Correctional Services) will forthwith:

1. forthwith offer Sheridan reinstatement to his former probationary correction officer position, and make him whole for any wages and benefits lost from his termination to the effective date of the offer of reinstatement, with interest at the maximum legal rate;

2. immediately remove and destroy all documents maintained by the State regarding the January 16, 2009 questioning of Sheridan, including the transcript of the January 16, 2009 interrogation, the January 20, 2009 memorandum to Martuscello, the written recommendation seeking Sheridan's termination dated January 21, 2009, and any other documents in DOCS personnel records, correction officer Sheridan's personnel history folder, and in DOCS OIG's investigatory notes, memoranda, email, and reports, relating to the questioning of Sheridan without representation;

3. reconsider Sheridan's probationary status without reference to the content of the January 16, 2009 questioning;; and

4. not use any information received from Sheridan during the January 16, 2009 questioning.

Dated . . . . . .

By . . . . . .
on behalf of **State of New York**
(Department of Correctional Services)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

CASE NO. U-28160

- and -

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent.

SHEEHAN, GREENE, CARRAWAY, GOLDERMAN & JACQUES, LLP (WILLIAM P. GOLDERMAN of counsel), for Charging Party

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on a motion by the State of New York (Department of Correctional Services) (State) seeking an order to reconsider and annul a portion of our remedial order, dated September 21, 2010, regarding its violation of §209-a.1(g) of the Public Employees' Fair Employment Act (Act) by denying representation to a probationary correction officer represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) during questioning by a Department of Correctional Services (DOCS) Office of Inspector General (OIG) investigator. Specifically, the State seeks reconsideration and annulment of the first

paragraph of the remedial order in our earlier decision.[1] NYSCOPBA opposes the motion.

PROCEDURAL HISTORY

During the hearing before the Assistant Director of Public Employment Practices and Representation (Assistant Director), the State presented evidence demonstrating that its denial of NYSCOPBA representation to the probationary correction officer in the present case was based upon an employer policy of denying such representation despite the Legislature's enactment of §209-a.1(g) of the Act. In addition, it is undisputed that on the date of the questioning the DOCS OIG investigator was unaware that the Act had been amended to guarantee to all public employees covered by the Act the right, upon request, to employee organization representation during employer questioning when it reasonably appears that the employee may be the subject or target of potential disciplinary action.

In her proposed remedial order, the Assistant Director directed, *inter alia*, that the State:

1. allow probationary unit employees NYSCOPBA representation, at the their request, when they are questioned by the State and at the time of questioning it reasonably appears that they may be the subjects of potential disciplinary action;

2. immediatey remove and destroy all documents maintained in DOCS' files, including corrections officer Chagnon's personnel file, relating to the portion of the interview conducted without corrections officer Chagnon's NYSCOPBA representative present,

[1] *State of New York (Department of Correctional Services)*, 43 PERB ¶3031 at 3123 (2010).

> including the parts of the report of investigator Nocera relating to said portion.[2]

Although the State objected generally to the Assistant Director's proposed remedial order, its exceptions were primarily focused on the second paragraph of the order. Its exception to the remedial order stated:

> Furthermore, the ALJ erred in creating an overly expansive remedy set forth in #2 as the remedy, even assuming a violation, should be limited to prohibiting the use of the January 28, 2008 statement against C.O. Chagnon.

The State did not, however, claim that the first paragraph of the proposed remedial order was overly expansive or inconsistent with our precedent. Following our examination of the record, we concluded that the breadth of the proposed order was appropriate because the State's violation was premised not merely on a single fact-based denial of such representation but on its across-the-board policy of denying employee organization representation during questioning of probationary employees. Nevertheless, we modified the wording of the first paragraph of the order to be consistent with the wording of §209-a.1(g) of the Act.

DISCUSSION

Our Rules of Procedure (Rules) do not expressly include a procedure permitting the filing of a motion to the Board for reconsideration of a final decision and order. Section 213 of the Act provides that a party aggrieved from a final Board decision and order may seek judicial review by filing a petition pursuant to CPLR Article 78 within 30 days after receipt of the Board's decision and order. In the present case, the State has

[2] 42 PERB ¶4552, at 4711 (2009).

not sought judicial review of our decision and order. Instead, it seeks reconsideration and an annulment of a portion of our remedial order.

Nevertheless, under certain unique facts and circumstances, the Board will entertain a motion to reconsider a final decision and order. However, such reconsideration does not extend the statute of limitations set forth in §213 of the Act.

In *Northport/East Northport Union Free School District, et al.*,[3] we reiterated that:

> A motion to an administrative agency for a reconsideration of its final administrative action is an unusual procedure. Such motions are properly entertained only if there is newly discovered evidence or the agency has overlooked or misapprehended relevant facts or that it has misapplied a controlling principle of law.[4] (footnotes omitted)

In its exceptions, the State did not claim that the Assistant Director's proposed order requiring it to permit NYSCOPBA representation during questioning of probationary unit employees was overbroad or inconsistent with prior precedent. Therefore, pursuant to §213.2(b)(4) of the Rules and our precedent, the State arguably waived the argument it now asserts.[5]

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[3] 27 PERB ¶3061(1994)

[4] *Supra*, note 3, 27 PERB ¶3061, at 3141. *See also UFT (Freedman)*, 34 PERB ¶3005 (2001); *Town of Brookhaven*, 19 PERB ¶3010 (1986); *Auburn Police Local 195, Council 82, AFSCME*, 10 PERB ¶3060 (1977); *Binghamton Firefighters, Local 729, IAFF, AFL-CIO*, 9 PERB ¶3078 (1976).

[5] *See*, *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed, Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany County 2007); *County of Monroe*, 43 PERB ¶3025, n.6 (2010).

However, "under §205.5(d) of the Act, it is our right and obligation upon finding an improper practice to have been committed to order such remedial relief as will effectuate the policies of the Act and it is that principle which both guides and limits our remedial determination."[6] In the application of our remedial powers, we are not limited by a remedy proposed by a charging party.[7] In the present case, it is undisputed that the State's denial of NYSCOPBA representation stemmed from a policy of denying such representation to probationary employees rather than a mere misapplication of the right guaranteed by §209-a.1(g) of the Act to a particular employee. In light of this fact the first paragraph of our order was aimed at ensuring that the State would change its policy. To avoid any confusion with respect to the purpose and scope of our prior order, we have clarified it accordingly.

IT IS THEREFORE ORDERED that the State:

1. modify its across-the-board policy of not permitting NYSCOPBA representation during questioning of DOCS probationary employees consistent with the provisions of §209-a.1(g) of the Act;
2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOCS OIG's investigatory notes, memoranda, email, and reports, which may contain information that was

[6] *City of Troy*, 28 PERB ¶3027, at 3064 (1995).

[7] *County of Columbia*, 41 PERB ¶3023 (2008).

obtained during the January 28, 2008 questioning of Chagnon without representation;

3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation;
4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment; and
5. sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
and in order to effectuate the policies of the
NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Correctional Services) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York (Department of Correctional Services) will:

1. modify its across-the-board policy of not permitting NYSCOPBA representation during questioning of DOCS probationary employees consistent with the provisions of §209-a.1(g) of the Act;

2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOC OIG's investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the January 28, 2008 questioning of Chagnon without representation;

3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation; and

4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment.

Dated ..... **By .....**
on behalf of
State of New York (Department of Correctional Services)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

YONKERS FEDERATION OF TEACHERS, LOCAL 860, AFL-CIO,

Charging Party,

CASE NO. U-27599

- and -

YONKERS CITY SCHOOL DISTRICT,

Respondent,

- and -

YONKERS COUNCIL OF ADMINISTRATORS, LOCAL 8, AMERICAN FEDERATION OF SCHOOL ADMINISTRATORS, AFL-CIO,

Intervenor.

JAMES R. SANDNER, GENERAL COUNSEL (ANN M. BURDICK of counsel), for Charging Party

DONOGHUE, THOMAS, AUSLANDER AND DROHAN (LAWRENCE W. THOMAS of counsel), for Respondent

BRUCE K. BRYANT, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Yonkers City School District (District) and the Yonkers Council of Administrators, Local 8, American Federation of School Administrators, AFL-CIO (Council) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Yonkers Federation of Teachers, Local 860, AFL-CIO (Federation) alleging that the District

violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred the duties of the International Baccalaureate (IB) program developer at the Casimir Pulaski School (Pulaski School) to a nonunit administrator. The District filed an answer denying the allegations of the charge. In its answer, the Council denied having knowledge and information sufficient to form a belief about several of the allegations.

Following a hearing, the ALJ concluded that the District's unilateral transfer of the IB developer duties violated the Act.[1]

EXCEPTIONS

The District argues in its exceptions that the ALJ erred in finding that the IB program developer duties were performed exclusively by Federation unit employees at the Pulaski School. In addition, it contends that the tasks assigned to the nonunit administrator were not substantially similar to the IB program developer duties performed by unit employees. The Council excepts to the ALJ's findings on the same grounds, and it asserts that the District substantially changed the qualifications for the IB developer position when it assigned the position's duties to a nonunit administrator. The Federation supports the ALJ's determination.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The Federation is the exclusive bargaining representative for teachers in the

[1] 42 PERB ¶4557 (2009).

District. The Council is the exclusive bargaining representative for District principals and assistant principals.

The International Baccalaureate (IB) is a multicultural educational program based in Switzerland. The IB program is offered at four District schools: Yonkers High School, Yonkers Middle School, the Rosemary Siragusa (Siragusa) School, and the Pulaski School. At the Pulaski and Siragusa Schools, the IB program is offered for students in kindergarten through grade five.

There is an IB program developer in each school. An IB program developer is responsible for administering the program in her or his assigned school, and the position's duties are the same at each school.[2] These duties include distributing IB program developments to teachers and administrators in their school, organizing and attending training events and workshops for teachers to learn how to integrate the IB philosophy into their lesson plans, and meeting with teachers in congruence sessions in their school. At the congruence sessions, the IB program developer supports and offers suggestions to teachers on how to promote the IB philosophy in their lesson plans and classroom activities. In addition, IB program developers communicate with other IB program developers in the District and with staff at the IB international office in Switzerland. If the IB program has been implemented at a school but it has not yet been certified by the IB international office, then the IB program developer prepares and submits the three-part certification application for the approval of the IB

[2] The title of the IB program developer position varies from school to school in the District, but the duties are the same regardless of title.

international office.

It is undisputed that Federation unit employees have exclusively performed IB developer duties at the Yonkers High School, Yonkers Middle School, and the Siragusa School.

In September 2004, the IB program was implemented at the Pulaski School. Marian Gildard (Gildard), a Federation unit employee, was the IB program developer at that school from September 2004 until January 2005, when she left for maternity leave. Mary Ellen Ryan (Ryan), a reading teacher and a Federation unit employee, performed IB developer duties after Gildard left in January 2005.[3] Leila Faour (Faour), a substitute teacher and Federation unit employee, was the IB program developer for the 2005-2006 school year. At the start of the 2006-2007 school year, there was no IB program developer at the Pulaski School. As a result of the vacancy, Marlene Feder (Feder), IB program developer at the Siragusa School since 2001 and Federation unit employee, performed IB program developer duties at the Pulaski School in addition to her duties at the Siragusa School from September 2006 until November 2006. The IB developer position was vacant, and Feder testified that its duties were not performed at the Pulaski School from November 2006 until January 2007.

As principal of the Pulaski School, Steven Murphy (Murphy) has supervisory responsibilities over the implementation of the IB philosophy at the school. When Murphy was hired in August 2006, two parts of the three-part application for certification

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[3] The record does not indicate when Ryan ceased to perform IB program developer duties.

had been submitted, and the school was preparing for the third part of the application, a visit by the IB certification team in November 2006. Murphy reviewed the school's application, noted that the IB program developer position was vacant, and contacted Feder for guidance on how to prepare for the visit by the IB certification team. The IB certification team visited and determined that certification of the school would be postponed because the IB program developer position was vacant.

Murphy attended an IB training in December 2006, and learned that in other school districts, IB program developer duties are performed by administrators. He also learned that accountability was critical to the functioning of the IB program. In January 2007, Murphy met with the District superintendent and other District officials to discuss hiring an assistant principal who would also coordinate and be accountable for the functioning of the IB program.

On January 17, 2007, the District hired Jelia Honeywell (Honeywell) to be assistant principal at the Pulaski School. Among the duties that were assigned to Honeywell were the IB program developer duties previously performed by Federation unit employees. Honeywell supervises and evaluates teachers and their teaching methods at the weekly congruence meetings, and she writes up the evaluations and submits them to the District. In addition, she has attended IB training sessions, she coordinates training for teachers at IB workshops and conferences, and she attends congruence meetings with teachers where she offers suggestions and help to teachers on how to promote the IB philosophy in their lesson plans.

DISCUSSION

The inquiry as to whether a transfer of unit work violates §209-a.1(d) of the Act centers around the resolution of two essential questions: 1) was the work at issue exclusively performed by unit employees for a sufficient period of time to have become binding; and 2) was the work assigned to nonunit personnel substantially similar to that exclusive unit work.[4] We will find a violation if both of these questions are answered in the affirmative unless there has been a significant change in job qualifications or there has been a curtailment in the level of services.[5] In such cases, we will balance the respective interests of the public employer and the unit employees, both individually and collectively, to determine whether there has been a violation of §209-a.1(d) of the Act.[6]

A. Exclusivity

We begin with the District's and Council's exception to the ALJ's finding that the IB program developer duties were performed exclusively by Federation unit employees. The District and the Council assert that because Faour was a *per diem* substitute teacher when she performed IB duties at the Pulaski School from 2005 to 2006, and because Murphy, the Pulaski School principal, performed IB-related duties in the fall of 2006, the Federation lacks exclusivity. The District and Council also assert that the IB

[4] *Town of Riverhead,* 42 PERB ¶3032 (2009), *County of Westchester*, 42 PERB ¶3025 (2009); *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), (subsequent history omitted); *Niagara Frontier Transp Auth*, 18 PERB ¶3083 (1985).

[5] *Supra* note 4.

[6] *Id.*

program developer duties are not exclusive to the Federation because they are inherently administrative in nature.

In determining the exclusivity of bargaining unit work, we will apply the past practice analysis restated in *Chenango Forks Central School District*:[7] whether the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."[8]

In this case, the record supports the ALJ's finding that the duties of the IB program developer at the Pulaski School and at the other IB schools in the District have been exclusively performed by teachers in the Federation bargaining unit. Federation employees continuously performed IB program developer duties at the Pulaski School from September 2004 until November 2006. The Federation unit had exclusivity over the work during this period because only unit employees performed IB program developer duties, and the performance of such work was unequivocal and uninterrupted. This created a reasonable expectation that the duties of IB program developer position at the Pulaski School would continue to be performed by Federation employees. In addition, no one from outside the unit performed the at-issue duties prior to the assignment of those duties to Honeywell in January 2007.

We find no merit to the District's and Council's assertion of non-exclusivity because Faour was a *per diem* substitute at the time she performed IB program

[7] 40 PERB ¶3012 (2007) (subsequent history omitted).

[8] *Chenango Forks Cent Sch Dist, supra,* note 7, at 3046-47.

developer duties at the Pulaski School. Regular substitute teachers and *per diem* appointments are included in the Federation bargaining unit pursuant to the recognition clause of the collectively negotiated agreement between the District and the Federation. Therefore, Faour's performance of IB program developer duties does not defeat exclusivity.

The record does not support the District's and Council's assertion that Murphy performed IB program developer duties in the fall 2006. Murphy testified that he attended a single IB training session from August 2006 to January 2007, and the evidence establishes that his attendance was part of his general supervisory duties. As principal, he was responsible for overseeing the entire IB program and ensuring that the IB philosophy was implemented. There is nothing in the record demonstrating that Murphy performed IB program developer duties such as sharing IB developments with teachers or other administrators, or meeting with teachers in congruence meetings to collaborate on lesson plans and activities. Therefore, we affirm the ALJ's determination that IB program developer duties were performed exclusively by Federation employees.

The District's and Council's argument that the IB program developer duties are non-exclusive because the duties are inherently administrative in nature is without merit. The issue presented in this charge is whether the at-issue work has been exclusively performed by Federation unit employees, and not whether the IB program developer belongs in the Federation unit. The latter issue could only be determined as part of a representation proceeding. The record clearly demonstrates that IB program

developer duties were performed exclusively by the Federation employees at the Pulaski School.

B. Sufficient Similarity in Duties Performed

We next address the District's and the Council's exception to the ALJ's finding that the tasks that were assigned to Honeywell were substantially similar to the duties performed by Federation employees. The District and the Council argue that Honeywell's duties as assistant principal are sufficiently different from the tasks previously performed by Federation unit employees because Honeywell performed IB program developer duties as part of her supervisory duties.

We disagree. The record demonstrates that Honeywell performed the same at-issue work previously performed by Federation employees in addition to her assistant principal work. Honeywell scheduled IB training for the teachers, met with teachers in congruence meetings where she collaborated with teachers regarding their lesson plans, made suggestions, and ensured that the lesson plans aligned with the IB philosophy.

C. Change in Qualifications

Finally, we address the Council's contention that there has been a change in the qualifications for the position.

We have held that a change in qualification refers to a decision, made by the employer, "that employees with different qualifications will perform the work better, or that the nature of the work is changed and must, necessarily, be performed by

employees with different qualifications."[9]

In this case, the record lacks any evidence of the District making such a decision. Murphy testified that the District decided to hire an assistant principal to perform combined assistant principal and IB program developer duties solely at the Pulaski School so that the assistant principal would work with teachers in congruence but also would be able to evaluate and supervise the teachers. However, there is no evidence that the District made a determination that administrative qualifications are necessary to perform IB program developer duties. Nor is there evidence that the nature of the IB program developer duties changed and required performance by employees with different qualifications. In fact, the District's reassignment of the IB program developer responsibilities to an administrator only at the Pulaski School belies the argument that the qualification for the position has changed. If a supervisory certification is necessary for the performance of IB program developer, the change would have been implemented for the positions at the other IB schools in the District.

Based upon our decision, we deny the exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the District:

1. cease and desist from unilaterally transferring to nonunit employees the work of the IB program developer at the Casimir Pulaski School;

[9] *County of Erie and Erie Community Coll*, 39 PERB ¶3005, at 3020 (2006), citing *West Hempstead Union Free Sch Dist*, 27 PERB ¶3096 (1981).

2. make Federation unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of the IB program developer at the Casimir Pulaski School with interest at the maximum legal rate;

3. restore to unit employees the bargaining unit work of the IB program developer at the Casimir Pulaski School;

4. sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the bargaining unit represented by the Yonkers Federation of Teachers, Local 860, AFL-CIO that the Yonkers City School District will:

1. refrain from unilaterally transferring to nonunit employees the work of the IB program developer at the Casimir Pulaski School;

2. make Federation unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of the IB program developer at the Casimir Pulaski School and with interest at the maximum legal rate;

3. restore to unit employees the bargaining unit work of the IB program developer at the Casimir Pulaski School;

Dated . . . . . **By** . . . . . .
(Representative) (Title)

Yonkers City School District

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 317,

Charging Party,

CASE NO. U-28315

- and -

TOWN OF SPAFFORD,

Respondent.

BLITMAN & KING LLP (NATHANIEL G. LAMBRIGHT of counsel), for Charging Party

HISCOCK & BARCLAY LLP (ALAN R. PETERMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Teamsters Local 317 (Teamsters) to a decision by an Administrative Law Judge (ALJ) on an amended improper practice charge filed by the Teamsters alleging that the Town of Spafford (Town) violated §209-a.1(a) of the Public Employees Fair Employment Act (Act) when it unilaterally increased the amount paid by the Town's Highway Department motor vehicle operators (employees) toward the cost of their health insurance premiums after a question of representation arose.

The ALJ dismissed the charge based upon a stipulation of facts and a certified copy of the Town's fiscal year 2008 budget resolution, which included the increase in

employee contributions for the health insurance premiums.[1]

EXCEPTIONS

The Teamsters argue in their exceptions that the ALJ erred in finding that there was no change in the *status quo* when the Town implemented the change in health insurance contribution effective January 1, 2008. The Town supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

On September 27, 2007, the Town voted to increase the Town Highway Department employee health insurance premium contribution from 0.0% to 3.0%, effective January 1, 2008. The Teamsters sought voluntary recognition from the Town on behalf of the Highway Department employees on November 5, 2007. On November 8, 2007, the Town adopted a budget resolution that included its prior determination to increase the employee health insurance premium contribution in the 2008 fiscal year. On November 30, 2007, the Town declined to voluntarily recognize the Teamsters and the Teamsters filed a representation petition on December 26, 2007. On January 1, 2008, the increase in the Highway Department employee health insurance premium contribution was implemented.

DISCUSSION

An employer violates §209-a.1(a) of the Act on a *per se* basis when it changes prevailing employment conditions when a representation petition is pending because

[1] 43 PERB ¶4519 (2010).

such conduct interferes with employees' statutory right of representation.[2] The employer's obligation to maintain the *status quo* begins on the date it is presented with a *bona fide* representation question and continues to the date a wage and benefit package is fixed by collective negotiations with the newly recognized or certified employee organization.[3]

The Teamsters argue that the Town changed the *status quo* after the representation question arose because the increase in the health insurance contribution was not in effect at the time that the Teamsters sought voluntary recognition, and it went into effect on January 1, 2008, after the Teamsters had filed a petition to represent the Highway Department employees.

We are not persuaded by the Teamsters' argument. We found in *City of Corning*[4] that there is no violation of the Act when an employer adopts a change to employment conditions before a representation question arises, without notice of the employees' organizing activity and the change is to take effect on a date after the representation question arose.

The parties stipulated that on September 27, 2007, the Town decided to increase the Highway Department employee health insurance premium contribution,

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[2] *Village of Suffern*, 38 PERB ¶3020 (2005); *Genesee-Livingston-Steuben-Wyoming BOCES*, 29 PERB ¶3065 (1996), *confd*, *Genesee-Livingston-Steuben-Wyoming BOCES v Kinsella*, 30 PERB ¶7009 (Sup Ct Livingston County 1997).

[3] *Village of Suffern*, *supra*, note 2; *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶3044 (1992), *revd on other grounds*, *Onondaga-Cortland-Madison BOCES v Kinsella*, 198 AD2d 824, 26 PERB ¶7015 (4th Dept 1993).

[4] 17 PERB ¶3022 (1984); *see also*, *Village of Suffern*, *supra* note 2.

effective January 1, 2008. The Town's decision was incorporated into the Town's budget for fiscal year 2008 on November 8, 2007. There is no evidence in the stipulated record to indicate that the Town's September 27, 2007 vote was not final until the Town incorporated it into the budget. The record demonstrates that the decision was made weeks before the Teamsters sought voluntary recognition on November 5, 2007 and nearly three months before the Teamsters filed its certification petition. In addition, there is nothing in the parties' stipulation to support a conclusion that the representation question was known to the Town prior to the request for voluntary recognition. Therefore, we affirm the ALJ's determination that there was no change in the *status quo* after the representation question arose.

In light of our finding that the decision to increase the health insurance contribution occurred before the Teamsters requested voluntary recognition, the *status quo* of the terms and conditions of employment for the Highway Department employees included the Town's decision to raise the insurance contribution to 3.0% effective January 1, 2008.

Based upon the foregoing, we deny the exceptions and affirm the decision of the ALJ.

DATED: November 9, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member